Filed 1/16/19 In re E.J. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

In re E.J., a Person Coming Under the Juvenile Court Law.	C086354
BUTTE COUNTY DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES, Plaintiff and Respondent, v. P.J., Defendant and Appellant.	(Super. Ct. No. J37698)

Appellant Patrick J. appeals from orders under Welfare and Institutions Code section 366.26 terminating his parental rights to his daughter, E.J.[1] He contends that (1) the juvenile court clerk failed to properly notify him of his right to file a writ petition challenging the referral order setting the section 366.26 hearing; (2) the purportedly

[1] Further undesignated statutory references are to the Welfare and Institutions Code.

defective writ advisement excuses his failure to file a writ and allows him to raise several issues from the referral hearing that would otherwise be barred, including whether the juvenile court erred by terminating reunification services without expressly finding that the Butte County Department of Employment and Social Services (Department) made active efforts to reunify an Indian family or provide him with reasonable services to meet his special needs; (3) the court and the Department failed to comply with the inquiry and notice requirements under the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.), which renders the juvenile court's finding that ICWA did not apply unsupportable; (4) insufficient evidence supports the court's adoptability finding; and (5) the court erroneously failed to apply the Indian child exception to adoption.

We conclude the writ advisement was adequate and that no good cause excused father from filing a writ challenging the referral order, including the termination of reunification services and issues regarding reasonable services and active efforts (if E.J. had been an Indian child). We further conclude that the court complied with the ICWA notice requirements, that substantial evidence supports the trial court's finding that ICWA did not apply, that sufficient evidence shows E.J. was adoptable within a reasonable time, and that because E.J. was not an Indian child, the Indian child exception to adoption did not apply. We affirm.

I. BACKGROUND

E.J. was born in Oroville in November 2015 to Rachel D. (mother) and appellant Patrick J. (father). She was detained three days after her birth and placed in foster care after her parents, who were very volatile, reactive and abusive towards hospital staff, were unable to care for her at the hospital.[2] They were unable to comfort E.J. when she

[2] According to the police officer's detention report, reasonable cause to detain E.J. existed given the following: "Severe mental health issues [with] parents; Father has long history of violence. Mother abused older child. Parents [] unable to care for child."

became distressed, had difficulty mastering diaper changes and dressing the baby, and could not assess the child's needs without prompting from staff. Both parents were clients of Far Northern Regional Center, and father had a history of paranoia.

One week after her birth, the Department filed a section 300, subdivision (b) petition alleging that father and mother were unable to adequately supervise, protect, or care for E.J. The ICWA-010 form attached to the petition noted that E.J. may have Indian ancestry as father reported that he was an enrolled member of the Miwok Tribe, but that father did not provide further information.

Detention Hearing

After a detention hearing on November 12, 2015, the court ordered E.J. detained, finding that removing her from her parents' care was necessary to protect her health and well-being. The court set the matter for a jurisdiction hearing in December 2015.

First Indian Ancestry Questionnaire

On November 23, 2015, the social worker completed an Indian Ancestry Questionnaire on father's behalf, and filed the form a week later with the court. The form lists Joyce J. as father's mother (she adopted him after his biological mother, Marlene M., died).

First ICWA Notice

On December 1, 2015, the Department sent an ICWA-030 notice to the Miwok and Me-Wuk Indian tribes[3] in addition to the Bureau of Indian Affairs and the Secretary of the United States Department of the Interior. The notice lists father's name, current address, and date of birth. The notice also lists Joyce J. as father's mother. The form

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[3] These tribes included the Buena Vista Rancheria Me-Wuk Indians, California Valley Miwok Tribe, Chicken Ranch Rancheria Me-Wuk Indians, Federated Indians Graton Rancheria, Ione Band of Miwok Indians, Jackson Rancheria of Me-Wuk Indians, Shingle Springs Band/Miwok Indians, Trinidad Rancheria, Tuolumne Band of Me-Wuk Indians, United Auburn Indian Community, and Wilton Rancheria.

contains the following notation: "FATHER UNWILLING TO PROVIDE ANY INFORMATION."

Several days later, the Department filed domestic return receipts from several Miwok or Me-Wuk tribes, including the United Auburn Indian Community, as well as the Sacramento Area Director of the Bureau of Indian Affairs. On December 8, 2015, the United Auburn Indian Community sent a responsive letter stating that neither of the parents were enrolled members of the tribe and that E.J. was not eligible for enrollment.

Second Indian Ancestry Questionnaire

On December 10, 2015, father completed a second Indian Ancestry Questionnaire form. Father reported that he had heritage through California Valley Miwok Tribe and had a California Judgment Roll number 64659/13891.[4] He also reported that he had received mental health counseling through the Feather River Tribal Health clinic. He listed his mother's identity as "unk[nown]."

Second ICWA Notice

The Department sent its second ICWA-030 notice on December 14, 2015. This notice stated that father had provided additional information concerning the California Valley Miwok Tribe in Stockton and listed his purported enrollment number of 13891. While Joyce J. was still listed as father's mother, no other linear information was provided. The same tribes and agencies were notified with the additional information.

Jurisdiction Hearing

Father appeared with his appointed counsel at the original jurisdiction hearing on December 16, 2015. At the hearing, the court found him to be the presumed father of E.J., and continued the matter to the following month to allow additional noticing efforts under ICWA.

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[4] As noted in the fifth ICWA notice, neither roll number were father's, nor was he enrolled in any tribe.

Father was present at the continued jurisdiction hearing on January 21, 2016. After the parents waived their trial rights and submitted on the petition as amended, the juvenile court took jurisdiction over E.J., sustaining the allegations that father and mother were unable to care for her, and that based on their documented delays or disabilities, both parents' behavior indicated that they lacked a basic understanding of how to provide for the safe and proper care of E.J. The court set a disposition hearing on February 11, 2016, and ordered reasonable visitation for the parents.

Original Disposition Hearing

A disposition report filed on February 10, 2016, recommended that E.J. be declared a dependent, that her parents be ordered into a plan of family reunification, and that they complete psychiatric evaluations. The report identified the Miwok or Me-wuk tribes that had been notified of possible Indian ancestry, and stated that five tribes, including the Auburn Indian Community, responded E.J. was not eligible for membership; responses from five tribes were still pending.

Father was present at the disposition hearing on February 11, 2016. The court authorized psychological evaluations and continued the matter.

At the continued hearing on February 18, 2016, the parents agreed to waive reunification services and requested that E.J. be placed out of state in legal guardianship with father's paternal cousin,[5] Angela (Angie) R. The disposition hearing was continued until April 2016 to allow the Department to file an application under the Interstate Compact for the Placement of Children (ICPC), and continued again until May 2016 because the ICPC process had not been completed.

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[5] It is not clear from the record whether Angela R. is father's paternal first cousin or second cousin.

Third ICWA Notice

The Department received new information from Angela R. regarding father's Indian ancestry. She alleged that she and father shared the same grandfather. His name was Charles J., and his father's name was Ted J.

In April 2016, the Department sent its third ICWA-030 notice that included the new paternal linear heritage obtained from Angela R. The notice listed Charles J. as E.J.'s paternal great-grandfather and identified his tribal membership and enrollment number for the Cherokee tribe as #63161 C0185243. The notice also referenced Ted J., Charles J.'s father, and his enrollment number for the Cherokee tribe as #63161 C0185241. The notice was sent to the original Miwok tribes as well as three Cherokee tribes, including Cherokee Nation, Eastern Band of Cherokee, and the United Keetoowah.

Continued Disposition Hearing

At the disposition hearing on May 5, 2016, the court considered an addendum to the previous disposition report. Father was present at the hearing. The addendum report included a guardianship evaluation for placement with Angela R. The Department recommended that guardianship be denied,[6] that the parents be ordered into a plan of reunification, and that they be ordered to comply with the psychological evaluations. The addendum report detailed continued difficulties in providing visitation to the parents due to father's aggressive and threatening behaviors towards Department staff, service providers, and the foster parent. The juvenile court declared E.J. a dependent of the court, ordered reunification services for the parents, authorized psychiatric evaluations

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[6] While Angela R. expressed an interest in providing permanency for E.J., she did not believe guardianship would be appropriate since father and mother had allegedly harassed her and her family with phone calls and through Facebook. Angela R. therefore declined her nomination as legal guardian.

for father and mother, and set an interim hearing to review ICWA status and the parents' progress in services.

Cherokee Nation May 2016 Response

On June 3, 2016, the Department filed a letter from the Cherokee Nation with the court. The letter, dated May 16, 2016, stated that E.J. could be traced in the tribe's records based on Charles Gay J., who was listed as her paternal great-grandfather with "CN Membership #C0185241." According to the tribe, at that time E.J. was "NOT an 'Indian child' in relation to the Cherokee Nation," but the letter included a membership application with instructions to send original state certified birth certificates for E.J., father, and Joyce J., E.J.'s paternal grandmother and father's adoptive mother. According to the application instructions, Joyce J.'s birth certificate had to list Charles Gay J.

Phycological Evaluations

On July 10, 2016, Dr. Scott Palmer prepared a report for each parent after conducting psychological evaluations. According to the reports, both father and mother suffered from significant intellectual disabilities that severely impaired their functioning and rendered them unable to care for E.J. Father also had a mood disorder, not otherwise specified. Neither parent was capable of reading the child's subtle cues, and neither had the ability to sufficiently utilize reunification services to reunify with E.J.[7]

ICWA Review Hearing

The ICWA review hearing was continued several times. At the continued hearing on September 21, 2016, counsel for the minor urged the court to decide that the child was

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[7] According to Dr. Palmer, the Department had not provided father and mother with parenting education adopted to meet the needs of an intellectually disabled parent, and the classroom instruction offered was often the worst mode of education for people with intellectual disabilities. Nevertheless, even if mother had been offered such services her intellectual deficits were so great that she would not be able to develop the problem-solving skills necessary to parent E.J. Similarly, father was unaware of his intellectual disability and mood disorder, which made accessing services, even if available, difficult.

an Indian child. The court, acknowledging that "we are trying to enroll [the child] as a member of the tribe," made the finding—without the Cherokee Nation's determination—that E.J. was an Indian child. Father informed the court that their previous social worker submitted the paperwork to enroll E.J. in the Cherokee Nation, and that he had also submitted his own paperwork to enroll himself in the tribe.

Status Review Report

The Department filed a status review report in November 2016 for the six-month review scheduled for December 1, 2016. The Department recommended that the court terminate reunification services for the parents and set the permanency planning hearing. Among other things, the report noted the services provided to father, the results of his psychological evaluation, and that he continued to test positive for drugs.

The status review report also discussed the potential relatives considered for placement. Angela R., father's paternal cousin, had withdrawn her application for placement of E.J. because she was fearful of father. An ICPC request for father's cousin, Charles J., had been submitted but the status of the home study was unknown at the time. The maternal grandparents, Flavio and Tina D., had stated they did not want placement of E.J. before she was detained because they were already caring for mother's other child. A maternal uncle and aunt, Rueben and Katrina D., were also being assessed for placement. The foster parents had also continuously expressed a desire to adopt E.J. According to the report, the Department, Butte County Adoptions, and the Cherokee Nation Representative, Nicole Allison, were working together to determine the best placement option and permanent plan for E.J.

Although the Cherokee Nation's May 16, 2016, letter did not expressly state that E.J. was eligible for enrollment in the tribe but only that she could be traced in the tribal records based on Charles Gay J. purportedly being her paternal great-grandfather, the ICWA section of the status review report stated that E.J. was "eligible for enrollment in Cherokee Nation" because father's "birth paternal great-grandfather was an enrolled

member" of the tribe. The status report stated that the Department was "in the process of enrolling [E.J.]; however, [father] was adopted as a child and his birth records are needed to verify [E.J.'s] lineage to Cherokee Nation."

Cherokee Nation November 2016 Response

On December 1, 2016, the date originally scheduled for the six-month review hearing, the Department filed a letter with the court from the Cherokee Nation. The letter, dated November 28, 2016, stated: "Cherokee Nation Indian Child Welfare has examined the tribal records regarding the above named child/children and it has been determined the child is not eligible for enrollment."

At the parents' request, a contested six-month review hearing was set for January 23, 2017, approximately one year after the court found jurisdiction.

Additional Indian Ancestry Questionnaires

On December 15, 2016, the Department met with father's adoptive mother, Joyce J., who was his biological aunt. The social worker filled out an Indian Ancestry Questionnaire on behalf of Joyce J. on that same day.

The social worker wrote that Joyce J. specifically said that father's Indian heritage through the maternal side of the family was with "United Auburn-Miwok." According to Joyce J., father's biological mother was Marlene M., and she died in 1989 or 1990 in San Francisco. She was thought to be Miwok through United Auburn, enrollment number 13891. The biological grandfather (or father's father) was listed as Mark J.; he was possibly in the Texas area and affiliated with the Cherokee. Joyce J. said she believed he was enrolled. A Vivian Rose R.V. was father's paternal grandmother, with a Miwok roll number of 64659, according to a BIA letter Joyce J. had from 1972. A date of birth for Vivian was also provided. Joyce J. said that Charles J. was a "relative," although it had previously been stated that Charles J. was a grandparent. A great-great-grandmother, Maude R., also known as Maude B., and a great-great-grandfather, Amos R., both with

Miwok ancestry, were provided, with no additional information. Joyce J. did not want to sign the Indian Ancestry Questionnaire.

Another Indian Ancestry Questionnaire was completed during an interview with father and filed on January 9, 2017. He had been interviewed once in late December and three times in early January. Father had previously provided his Miwok roll number as 13891 on December 14, 2015. Father now said that the number was not his roll number, but it was either his biological mother's or his maternal relatives. He also provided information on his biological mother, her roll number (possibly 13891), and on his father: Mark Harold J., his date of birth, that he had Cherokee ancestry, and was not enrolled. Father listed Elaine E.P., also known as Elaine J., as his paternal grandmother, and as affiliated with Cherokee. He listed his paternal grandfather as Ronald Charles J., born 1936, possibly in Oklahoma, and affiliated with Cherokee. This ancestor was *not* the same as Charles Gay J., who father now believed to be a sibling of Ronald. The social worker included the following information attached to the questionnaire: "Charles Gay J[.] [¶] [Charles' date of birth]. Possibly OK. [¶] #63161 [¶] CO185241 or 243 [¶] I asked multiple times to be sure—[father] said this is not his grandparent, but possibly Ronald's sibling. 'It's a roll # of a part of my family. That's all I know.' 'It's a big family.' " This was consistent with the information provided by Joyce J., father's adoptive mother, that Charles J. was only a "relative" and not father's grandfather.

Fourth ICWA Notice

On January 9, 2017, the Department sent its fourth ICWA-030 notice, incorporating the additional information. The notice also included tribal information for other relatives, including Charles Gay J., who was listed as possibly being Ronald J.'s sibling, which was consistent with the information father provided in his most recent Indian Ancestry Questionnaire. The notice was served on 11 Miwok tribes and three Cherokee tribes, including the Buena Vista Rancheria Me-Wuk, the Cher-Ae Heights/Trinidad Rancheria, the California Valley Miwok tribe, Chicken Ranch

Rancheria Me-Wuk tribe, the Federated Indians Graton Rancheria, the Jackson Rancheria Me-Wuk Indians, the Maidu United Auburn Indian Community (at two separate addresses), the Ione Band of Miwok Indians, the Shingle Springs Band/Miwok Indians, the Tuolumne Band of Me-Wuk Indians, Wilton Rancheria, the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee, and Cherokee Nation. The parents, attorneys, the BIA, and the Secretary of the Interior were also served with the notice.

In the fourth ICWA notice, the social worker wrote that Joyce J. had confirmed that she had no more information regarding defendant's ancestry. She was not involved with either side of the family and did not have contact with anyone who would have more information; at that point, she had provided all known information regarding father's heritage. Furthermore, using the additional information provided by father, the Department attempted to locate his father, grandfather, and various other relatives through different online search engines. The Department had been unable to contact anyone for further information, however, because all phone numbers had been disconnected.

Six-Month Review Hearing

On January 23, 2017, the parents' contested six-month review came on for hearing. The court received into evidence the social worker's status review report but reserved the issue of whether Dr. Palmer's report would come into evidence. The social worker testified about various issues the Department had with providing services to the parents.

Following testimony, county counsel noted that the "current status of the Indian Child Welfare Act is that it applies according to a ruling by this Court; however, we have not found a tribe yet that says the child is an Indian child." He explained that the Department had continued to send out notices, and that it had been in contact with the representative of the Cherokee Nation for a number of months, but that the Department

was not able to come up with an original birth certificate for father. County counsel agreed that, under ICWA standards, "active efforts" were not provided, but he contended that under non-ICWA standards, reasonable services had been provided. At that point, father's attorney was willing to stipulate that reasonable services had been provided to the parents, but that active efforts had not been made. County counsel requested that the matter be continued out to July 5, 2017, for a combined six- and 12-month review.

Two days after the contested hearing, on January 25, 2017, father filed another ICWA-020, Parental Notification of Indian Status, adding Wintun to the Cherokee and Miwok tribes. He dropped Wintun on his next ICWA-020, filed a month later. On February 24, 2017, mother filed a new ICWA-020 form alleging she had Maidu ancestry.

Cherokee Nation January 2017 Responses

On January 26, 2017, the Cherokee Nation responded that E.J. was not an Indian child and that none of the names provided could be found as current enrolled members. The letter referenced E.J., mother, father, father's biological parents, as well as Vivian Rose R. and Aaron E. M. as paternal great-grandparents. Five days later, on January 31, 2017, the Cherokee Nation sent another letter again stating that E.J. was not an Indian child, and listing several provided names, none of which were found to be enrolled members in the tribe. These names included E.J., mother, father, father's biological parents, Vivian Rose R. as paternal great-grandmother, and Ronald Clint J. and Aaron E. M. as paternal great-grandfathers. A similar letter from United Auburn Indian Community of Auburn Rancheria (Miwok and Maidu) dated January 13, 2017, responded that E.J. was not eligible for membership in the tribe; neither mother nor father were or had ever been enrolled members of the tribe.

Further Indian Ancestry Questionnaires

Following the new Parental Notifications of Indian Status filed by the parents, the mother's parents, Flavio and Tina D., were interviewed and an additional Indian Ancestry Questionnaire was prepared and filed with the court. Both grandparents stated they did

not have any Indian ancestry. The grandparents provided detail about their parents and grandparents, none of whom were known to have Indian ancestry.

Another Indian Ancestry Questionnaire was completed and filed for mother after she was interviewed. Mother claimed that she was "Midiu" through Mooretown Rancheria, and that she believed she had relatives, Toni and Chris B., who had lived on trust land, a reservation, rancheria, or Indian allotment.

Fifth ICWA Notice

On March 30, 2017, the Department filed a fifth ICWA-030 notice incorporating mother's claim of Maidu ancestry with the Mooretown Rancheria. In addition to the 11 prior Miwok tribes, the three Cherokee tribes, the BIA, and the Secretary of the Interior, the Department provided the information and notices to the known Maidu tribes and rancherias: Berry Creek Rancheria, Chico Rancheria-Mechoopda Indians, Enterprise Rancheria, Greenville Rancheria, United Auburn Indian Community, Mooretown Rancheria, and Susanville Rancheria.

Mailing Address Notification

On May 1, 2017, mother filed a JV-140 Notification of Mailing Address, changing her address to a P.O. Box in Oroville with a ZIP code of 95965. Father filed a similar JV-140 also showing the same new P.O. Box address.

Motion to Terminate Services and Request to Set Section 366.26 Hearing

Three days later, on May 4, the Department filed a JV-180 to terminate services and refer the matter for a hearing pursuant to section 366.26 to select a permanent plan for the child. The motion asked the court to find that returning E.J. to the parents would create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. It also asked the court to find that the parents had not made substantive progress in services as they failed to participate regularly and make substantive progress in their treatment plan.

Notice of the May 17, 2017, referral hearing was given to counsel and to the parents by mail. With respect to the parents, the notice was sent to the correct post office box in Oroville, but included an incorrect zip code, 95966 instead of 95965, as listed on the parents' updated JV-140 Notification of Mailing Address forms.

Addendum Report

An addendum report was filed with the JV-180 to terminate services, which provided greater detail and assessment of the parents' situation. The social worker noted the parents had received 18 months of services since the child was removed at the hospital, and that they had demonstrated an inability to utilize and benefit from the reunification services offered.

According to the addendum, the Department "ha[d] encountered numerous challenges [in] providing the parents with active efforts for services due to their ongoing aggressive, challenging, and delusional interactions with [the Department's] staff, service providers, foster parents, extended family members and other parties." During that time, the parents had contacted local law enforcement agencies 47 times with complaints against neighbors, family members, and drivers in the community. The parents had also made numerous false allegations and complaints against 30 different Department staff members and community service providers. The addendum further stated: "As a result of their challenging and abusive behaviors, the parents have either refused to or have been forbidden to partake in referred services including substance abuse testing at Butte County Probation, mental health services through Butte County Behavioral Health, Native American services at Feather River Tribal Health, PEER Parenting through Counseling Solutions, and visitation with their child at Youth for Change Visitation Center." Although the Department made extensive efforts to provide alternate accommodations for the parents, including referring the parents to alternate services, reassigning staff members, changing locations of service delivery, coordinating team meetings, facilitating weekly phone calls, and coordinating services with Far Northern

Regional Services, the alternate provisions were deemed unsuccessful given the parents' unaddressed and unresolved mental health and substance abuse issues in addition to their intellectual disabilities.

Although notice of the May 17 hearing was sent to the incorrect ZIP code, the court found adequate notice had been sent. Nothing in the record shows the hearing notice was returned to the court's file as undeliverable. The parents were present at the hearing. The minutes describe the matter at issue as "JV-180 re: termination of reunification services." The court continued the matter until May 31, 2017. At the continued hearing two weeks later, neither parent was present despite having been present when the continued hearing was set. The matter was then continued for a contested hearing on June 15, 2017.

Contested Referral Hearing

Neither father nor mother showed up to the contested referral hearing on June 15, 2017, although each of their counsel was present. Father's counsel informed the court that his office had called and left a message for father informing him of the June 15 court date. The social worker supervisor also spoke with father on June 5, and reminded him of the June 15 hearing date on the request to terminate services.

The court received oral and documentary evidence, including the JV-180 and addendum, and made the findings and orders terminating reunification services. The court set a section 366.26 permanency planning hearing for October 11, 2017, and the court instructed the parents' counsel to inform them of their writ rights.[8] The court also

[8] The court continued the October 11, 2017, hearing to October 25. At the time, defendant was present in custody on new charges from an altercation on August 17 involving an assault with a deadly weapon. Father was subsequently incarcerated and the court denied visits.

authorized provisional approval for an ICWA expert, as county counsel represented that he believed they would be ruling out application of ICWA within the next 30 days.

Advisement of Writ Rights

That same day, the court clerk served copies of the JV-820 and JV-825 forms on the parents via mail.[9] As with the notice of the May 17 hearing, the forms were mailed to the correct P.O. Box in Oroville, but included the wrong ZIP code (95966 instead of 95965). Nothing in the record shows the forms were not delivered, or that they were otherwise returned to the court's file as undeliverable.

Motion to Rule Out Application of ICWA

On September 18, 2017, the Department filed a motion to rule out the application of ICWA. In total, the Department had sent five ICWA notices. The last notice was sent to 20 separate Miwok, Cherokee, or Maidu tribes. The Department received responses from all the tribes except for three, and more than 60 days had passed since the notices were sent. None of the tribes identified E.J. as an Indian child.

On October 25, 2017, the court heard the Department's motion to rule out application of ICWA. Over father's objection, the court found that ICWA did not apply. At the hearing, father asserted that Charles J. was his grandfather even though he had told the social worker a few months earlier that Ronald J. was his grandfather and Charles J. was *not* his grandfather but rather he believed him to be a sibling of Ronald J.

First Motion to Obtain MRI

The court granted the Department's request to obtain an MRI for E.J. to identify the underlying causes of her developmental delays and headaches. Over the objection of

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[9] A copy of Judicial Council forms JV-820 and JV-825 are not included in the record, but we can and do take judicial notice of the forms. (Evid. Code, §§ 452, subds. (c), (h), 459.)

father's counsel, the court authorized the MRI. The court also continued the contested section 366.26 hearing to November 13, 2017.

Section 366.26 WIC Report

Prior to the section 366.26 hearing, the Department filed a section 366.26 WIC Report. The report, dated October 10, 2017, recommended that the parental rights of mother and father be terminated, and that E.J. be ordered into a permanent plan of adoption. Regarding ICWA status, the report stated, based on the Cherokee Nation's most recent letters (dated January 26 and January 31, 2017), that E.J. was not considered an Indian child in relation to the tribe and that none of the names provided could be found as currently enrolled members. Father, according to the report, "was adopted at a young age and is unable to provide the necessary documentation to Cherokee Nation in regard to his biological parents. For that reason, Cherokee Nation has informed the agency that they are unable to move forward with enrollment."

In addition to discussing ICWA, the 366.26 WIC Report addressed E.J.'s medical care, developmental issues, educational needs, and her mental and emotional status. An Adoptions Report, a Health and Education Passport, and an updated case plan were attached.

According to the Adoptions Report, E.J. had been with the same foster family since January 2016 when she was about two months old; the foster family wanted to adopt her. The Adoptions Report stated that E.J. may have Native American heritage, but that father's birth records were needed to verify E.J.'s lineage in Cherokee Nation and that the Department had "exhausted all of their efforts at enrolling [E.J.] in Cherokee Nation." The report discussed her medical, developmental, mental health, and emotional status. It noted that father and mother both had developmental delays, and that developmentally E.J. appeared to be making progress. Termination of parental rights was found to be in the best interests of the child.

The Health and Education Passport, attached to the 366.26 WIC Report, indicated that E.J. had "poor emotional regulation and cries frequently." She continued to receive weekly services from the Parent Infant Program at Far Northern Regional Center and attended occupational therapy every other week. At age two, she would be evaluated for speech therapy.

Contested Section 366.26 Hearing

At the contested section 366.26 hearing on November 13, 2017, the court admitted the 366.26 WIC Report into evidence, including the attached adoption assessment. Father proceeded by way of offer of proof, disagreeing with the court's previous ruling that ICWA did not apply and opposing adoption. The court found notice was given as required by law, that the minor was likely to be adopted, and terminated the parental rights of mother and father. Father appealed the termination order; mother did not.

II. DISCUSSION

A. Judicial Advisement of Writ Requirement

Father contends the court clerk failed to properly advise him of his right and requirement to file a notice of intent and writ petition to preserve his challenge to the order referring the matter for a section 366.26 hearing. Given this purportedly defective writ advisement, father argues that he has not forfeited his challenge to the order terminating reunification services, which the court made at the referral hearing. After examining the record, we conclude father was properly advised, and that his failure to file a petition for writ of mandate is not excused.

Section 366.26, subdivision (l), provides that an order setting a section 366.26 hearing "is not appealable at any time" unless "[a] petition for extraordinary writ review was filed in a timely manner," the petition raised the substantive issues and they were supported by an adequate record, and the writ petition "was summarily denied or otherwise not decided on the merits." (§ 366.26, subd. (l)(1)(a)-(c).) This writ

requirement is implemented by the California Rules of Court. (§ 366.26, subd. (l)(3); Cal. Rules of Court, rules 8.450, 8.452.)[10]

After the juvenile court makes an order setting a section 366.26 hearing, the court must advise all parties, including a parent, of section 366.26's requirement of filing a petition for extraordinary writ review. (Rule 5.590(b); see § 366.26, subd. (l)(3)(A).) The court must orally advise the parties present at the time the order is made, explaining that the party is required to seek an extraordinary writ by filing a Notice of Intent to File Writ Petition and Request for Record (Judicial Council form JV-820) and a Petition for Extraordinary Writ (Judicial Council form JV-825). (Rule 5.590(b); § 366, subd. (l)(3)(A).) "Within one day after the court orders the hearing under Welfare and Institutions Code section 366.26, the advisement must be sent by first-class mail by the clerk of the court to the last known address of any party who is not present when the court orders the hearing under Welfare and Institutions Code section 366.26." (Rule 5.590(b)(2).) Copies of Judicial Council forms JV-825 and JV-820 "must accompany all mailed notices informing the parties of their rights." (Rule 5.590(b)(4).) Judicial Council form JV-820 contains an advisement about the need to file the notice of intent form to obtain Court of Appeal review of an order setting a section 366.26 hearing and provides important information regarding completion and filing of the form, filing the writ petition, and specific deadlines.

If a parent fails to timely file a Notice of Intent, matters which were determined at the referral hearing are not subject to later appeal. (*In re Merrick V.* (2004) 122 Cal.App.4th 235, 247 ["All court orders, regardless of their nature, made at a hearing in which a section 366.26 permanency planning hearing is set must be challenged by a petition for extraordinary writ"]; *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1022

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[10] Further references to "rule" or "rules" are to the California Rules of Court.

[section 366.26, subdivision (l) applies to all " 'issues arising out of the contemporaneous findings and orders made by a juvenile court in setting a section 366.26 hearing' "].) Section 366.26, subdivision (l) provides in relevant part: "(2) Failure to file a petition for extraordinary writ review within the period specified by rule, to substantively address the specific issues challenged . . . shall preclude subsequent review by appeal of the findings and orders made pursuant to the section."

In this case, the referral hearing was held on June 15, 2017. Father was not present, but his counsel was present. At the hearing, the court terminated reunification services to father and mother, and set the section 366.26 hearing. The court acknowledged that "[t]he parents have writ rights," and instructed their respective counsel "to give them their writ rights if you talk to them." That same day, the juvenile court clerk mailed blank copies of the JV-820 and JV-825 forms to father at the correct P.O. Box in Oroville, but with an incorrect ZIP code (95966 instead of 95965).

Father challenges the writ advisement on two grounds. First, he contends that the blank Judicial Council forms were insufficient to advise him of the need to file a writ petition to preserve any issues necessarily decided at the referral hearing. Second, he contends that the incorrect ZIP code rendered the notice ineffective. Neither argument is persuasive.

The Judicial Council forms mailed to father sufficiently informed him of the need to file a writ petition, and the deadline for doing so, in order to preserve review of the issues decided at the referral hearing. Judicial Counsel form JV-820 is a two-page printed form entitled Notice of Intent to File A Writ Petition and Request for Record to Review Order Setting a Hearing Under Welfare and Institutes Code Section 366.26. (See Judicial Council Forms, form JV-820.) Centered on the first page in bold print, the form states: "**NOTICE [¶] The juvenile court has decided it will make a permanent plan for this child that may result in the termination of your parental rights and adoption of the child. If you want an appeals court to review the juvenile court's**

decision, you must first tell the juvenile court by filing a Notice of Intent. You may use this form as your Notice of Intent. In most cases, you have only 7 days from the court's decision to file a Notice of Intent. Please see page 2 for your specific deadline for filing this form." (Judicial Council Forms, form JV-820, at p. 1.) The front page of the form also contains the following in bold: "**PLEASE READ THE BACK OF THIS FORM FOR IMPORTANT INFORMATION AND DEADLINES**[.]" (*Ibid.*)

On the second page of the form, there are boxes explaining what will happen at the hearing to make a permanent plan, how a person challenges the court's decision to set a hearing to make a permanent plan, and when a person has to file his or her notice of intent to file writ petition and request for record. (See Judicial Council Forms, form JV-820, at p. 2.) JV-820 states: "If you were not present in court but were given notice by mail of the court's decision to set a hearing to make a permanent plan and you live in California, you must file the Notice of Intent within 12 days from the date the clerk mailed the notification." (*Ibid.*)

While rule 5.590(b) requires an advisement of writ review rights *accompanied* by copies of Judicial Council forms JV-820 and JV-825 (rule 5.590(b)(4)), by itself form JV-820 sufficiently informed father (1) the juvenile court decided it would make a permanent plan for E.J. that may result in termination of his parental rights and adoption of the child; (2) if he wished to challenge that decision he was required to file a notice of intent; and (3) because he was absent when the juvenile court set the permanency hearing, father was required to file his notice of intent within 12 days of the date the court clerk mailed the forms. Nothing more was required.

In re A.A. (2016) 243 Cal.App.4th 1220 is instructive. There, the court rejected the mother's argument that in addition to the blank copies of Judicial Council forms JV-820 and JV-825 the juvenile court was required to also mail her a separate notice of writ review rights, a copy of the minute order indicating the date of the permanency hearing,

and to inform her of the date on which a notice of intent to file a writ petition had to be filed. (*Id.* at p. 1241.) The court held that the blank Judicial Council forms sufficiently informed the mother of her writ rights and applicable deadline for filing her notice of intent. (*Ibid.*) It also found that the social worker, and not the court, was required to give a parent notice of the date and time of the permanency hearing under section 294, subdivision (e), and that while including a copy of the minute order setting a permanency hearing with the notice of writ rights was certainly a good idea, rule 5.590 did not require it. (*In re A.A., supra,* at p. 1241.)

Here, the record shows the clerk timely mailed father copies of the requisite blank Judicial Council forms. Father, however, did not file a writ petition. Nor did father make any attempt to take an appeal from the referral order. (See *Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 259-260 [transcript showed court did not advise mother of writ requirement; court found "good cause exists for mother's failure to file a timely writ petition from the setting order" and construed mother's purported appeal from the setting order as a petition for writ of mandate].)

The fact that the clerk's proof of service shows an incorrect ZIP code, moreover, does not render the notice ineffective under the circumstances presented in this case. (See, e.g., *In re T.W.* (2011) 197 Cal.App.4th 723, 729-731 [omission of ZIP code in mailing notice did not relieve mother of obligation to file a petition for extraordinary writ challenging juvenile court's disposition order denying her reunification services and setting a permanency planning hearing under section 366.26].) The post office box for father's address to which the written advisement was sent was correct. Despite having a ZIP code off by a single digit (95966 instead of 95965), there is no indication in the record that the Judicial Council forms were returned to the sender, indicating that they were indeed received. Father has offered no declaration stating that he did not receive the advisement, nor does his brief claim he did not receive the forms. Given the above, it is reasonable to infer that father in fact received notice as mailed.

In fact, notice of a hearing on the Department's request to terminate services and set the section 366.26 hearing, filed May 4, 2017, was served on father by mail and also included the incorrect ZIP code with a correct address to the P.O. Box in Oroville. As with the writ advisement, there is no evidence in the record showing that the hearing notice was returned to the court as undeliverable. And, notwithstanding the incorrect ZIP code, father appeared at the hearing, which implies he actually received the notice.

Father's reliance on *Moghaddam v. Bone* (2006) 142 Cal.App.4th 283 for the proposition that an incorrect ZIP code invalidates notice is misplaced. Although the court found a notice of an order setting aside a default judgment that was sent to the correct post office box but with an incorrect ZIP code inadequate, the party there denied receiving it and there was no proof notice was actually received. (*Id.* at pp. 286-287.) Here, by contrast, father does not contend he did not receive the mailed notice and no evidence shows the notice was returned to the court as undeliverable. (Compare *In re Cathina W.* (1998) 68 Cal.App.4th 716, 722, 723 [court "agree[d] with the mother that she has shown good cause for her failure to file . . . a writ petition"; notice (which was returned to sender and not remailed) was mailed untimely and with material defects, and mother maintained she never received it and was not aware of her right to seek writ review].) Instead, there is evidence in the record from which it can be inferred that father did receive notices that were mailed with the incorrect ZIP code as he appeared at a hearing after one such notice was sent.

Finally, we note that father's attorney was also present at the hearing, heard the court's oral advisement regarding father's writ rights, and was specifically instructed by the court to inform father of his right to file a writ petition. There is no evidence to suggest father's counsel did not in fact inform him of the writ requirement. And, there is ample evidence in the record showing father and his counsel remained in constant contact throughout the proceedings. For example, father often refused to speak with the social worker and would instead instruct her to contact his attorney. After receiving the results

of Dr. Palmer's psychological evaluations, father became upset and agitated, stated he was going to call his attorney, and did so, setting up a meeting with him to discuss the issue. At the referral hearing, father's attorney also informed the court that he did have contact with father and that he had informed him of the hearing date. Under these circumstances, it is reasonable to infer defendant's counsel informed him of the writ petition requirement as instructed by the court.

Given the above, we see no good cause to relieve father of the requirement to file a writ petition challenging the referral order setting the section 366.26 hearing. In the absence of a proper writ petition, father cannot now contest the referral order terminating reunification services, including on the grounds that the juvenile court failed to find active efforts[11] under ICWA had been made not to break up an Indian family and that the Department provided him with reasonable services based on his special needs.[12]

B. ICWA Compliance

Father contends the juvenile court and the Department failed to comply with ICWA's inquiry and notice requirements thereby rendering the court's finding that ICWA did not apply unsupportable. He argues that the fifth ICWA notice improperly listed Charles J. as a distant relative rather than father's grandfather, that the notice sent to the United Auburn Indian Community of the Auburn Rancheria of California was wrongly addressed to the ICWA representative rather than the designated tribal representative, and that the Department failed to follow up with the application to enroll E.J. in the Cherokee Nation. None of father's contentions have merit.

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11 Even if father's active efforts arguments were not barred, any error would be harmless since E.J., as we explain in Section B of the Discussion, *post*, is not an Indian child within the meaning of ICWA. (25 U.S.C. § 1903(4).)

12 We also note that father conceded reasonable services had been provided.

Congress enacted ICWA in 1978 to address rising concerns over Indian children being improperly separated from their families and tribes through adoption or foster care placement in non-Indian homes. (*In re Isaiah W.* (2016) 1 Cal.5th 1, 7; *Miss. Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32 [104 L.Ed.2d 29].) ICWA was intended "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families" by establishing minimum Federal standards for removing Indian children from their families. (25 U.S.C. § 1902.)

The minimum standards established by ICWA include the requirement of notice to Indian tribes in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights "where the court knows or has reason to know that an Indian child is involved." (25 U.S.C. § 1912(a).) Congress has defined "Indian child" for these purposes as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).)

If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the United States Secretary of the Interior (Secretary), whose department includes the Bureau of Indian Affairs (BIA), in like manner. (25 U.S.C. §§ 1912(a), 1903(11).) The Secretary shall have 15 days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. (25 U.S.C. § 1912(a).) This notice requirement, which is also codified in California law (former § 224.2), "enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the proceeding." (*In re Isaiah W., supra*, 1 Cal.5th at p. 5.)

No proceeding to place a child in foster care or terminate parental rights can be held "until at least ten days after receipt of [ICWA] notice by the parent or Indian custodian and the tribe or the Secretary . . . ." (25 U.S.C. § 1912(a); see former § 224.2, subd. (d).) "After proper notice has been given, if the tribes respond that the minor is not

a member or not eligible for membership, or if neither the BIA nor any tribe provides a determinative response within 60 days, then the court may find that ICWA does not apply to the proceedings." (*In re Isaiah W., supra,* 1 Cal.5th at p. 15; former § 224.3, subd. (e)(3).) Proof of the notice, including copies of notices sent and all return receipts and responses received, must be filed with the court in advance of the hearing. (Former § 224.2, subd. (c); *In re Robert A.* (2007) 147 Cal.App.4th 982, 989 ["To enable the juvenile court to review whether sufficient information was supplied, Agency must file with the court the ICWA notice, return receipts and responses received from the tribes"].)

ICWA notices sent to Indian tribes must contain enough identifying information to be meaningful. (*In re Robert A., supra,* 147 Cal.App.4th at p. 989.) "A 'social worker has a "duty to inquire about and obtain, if possible, all of the information about a child's family history" ' required under regulations promulgated to enforce ICWA." (*Ibid.*) Such information, if known, includes the name, birthdate, and birthplace of the child, the name of the Indian tribe in which the child is a member or may be eligible for membership, all names known of the Indian child's biological parents, grandparents, and great-grandparents or Indian custodians, including maiden, married and former names or aliases, as well as their current and former addresses, birthdates, places of birth and death, tribal enrollment numbers, and another other known identifying information. (25 C.F.R. § 23.111(d)(1)-(4); former § 224.2, subd. (a)(5).)

In this case, the Department sent five ICWA notices with information obtained from father, father's paternal cousin, father's adoptive mother, mother, and mother's parents. These notices included E.J.'s name, birthdate, place of birth and known information regarding her lineal heritage, including her parents' names and places and year of birth, as well as information on her grandparents, great-grandparents, and great-great-grandparents. The fifth notice was sent to 20 different tribes, including Mi-wok, Cherokee, and Maidu tribes, plus the Secretary of the Interior and the BIA. Of the 20

tribes notified, only three did not respond; none of the tribes or the Secretary of the Interior or BIA identified E.J. as an Indian child.

Despite these multiple notices, father takes issue with the fifth ICWA notice on several grounds. First, he argues the notice improperly listed Charles Gay J., a Cherokee Nation tribal member, as a possible sibling of father's grandfather, Ronald J., rather than as father's grandfather. While earlier information suggested that Charles J. was father's grandfather and that information *was* provided to the tribes in the third ICWA notice, both father and his adoptive mother, Joyce J., later explained to the social worker that Charles J. was *not* father's grandfather, but merely a relative. Instead, father identified his grandfather as Ronald J., and he identified Charles J. as possibly being a sibling of Ronald. That new information was incorporated into the fourth and fifth ICWA notices and appropriately served on the tribes.

Next, father complains that the ICWA notice sent to the United Auburn Indian Community of the Auburn Rancheria of California was not accurately addressed to the designated tribal representative. He cites without discussion *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1201, in which the court found the ICWA notice insufficient where notices to three tribes were not sent to the tribal chairperson or the designated agent. Although the agency had signed domestic receipts from the three tribes, the court noted that none of the tribes had responded to the notice so the record contained no verification that notice actually reached the three nonresponsive tribes. (*Ibid.*) That is not the case here.

While the Department may have sent notice to the "ICWA representative" rather than the Director of Community Services as the tribe's designated contact person, unlike in *In re Alice M.*, the record in this case contains evidence that the tribe actually received the notices and submitted written responses. On December 8, 2015, the United Auburn Indian Community responded that the parents are not now nor ever were members, and the child is not eligible for membership. On December 23, 2015, in response to another

ICWA notice, an identical response was received from the tribe. And on January 13, 2017, the tribe again reiterated that the parents are not now, nor have been, members of the tribe, and the child was not eligible for membership.

Finally, father argues that regardless of the five ICWA notices the Department sent, it failed to follow up with the application to enroll E.J. in the Cherokee Nation tribe, in which he claims she was eligible to enroll. According to father, the Department failed to obtain his birth certificate, which was required to enroll E.J. in Cherokee Nation. He complains the Department failed to report what steps it took to fill out the membership application form or describe its efforts to obtain the necessary birth certificate.

Initially, we note that father never objected that the Department failed to adequately describe its efforts to obtain father's birth certificate. Had father objected, the juvenile court could have easily asked the Department to describe its efforts in greater detail. Without an objection below, he has forfeited any such objection on appeal. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1317; *In re Brian P.* (2002) 99 Cal.App.4th 616, 623.)

The Department, moreover, affirmatively represented that it had "exhausted all of their efforts at enrolling [E.J.] in Cherokee Nation." Based on this statement, we reasonably can infer that the social worker made the requisite inquiry and tried all possible means to verify E.J.'s lineage in Cherokee Nation and enroll her in the tribe. (*In re E.H.* (2006) 141 Cal.App.4th 1330, 1334 [from affirmative representation that ICWA did not apply, court could fairly infer that the social worker made the necessary inquiry].)

The record in fact shows the Department filled out the application and submitted it to Cherokee Nation, trying to enroll E.J. in the tribe. Father himself represented that the social worker submitted the application on behalf of E.J. and that he had submitted his own application to the same tribe. The record further shows that the Department worked closely with the Cherokee Nation representative to determine the best placement for E.J. if she was eventually determined to be an Indian child, which she was not. The fact that the Department was unable to obtain father's birth certificate does not mean the

Department failed to make the necessary inquiry under ICWA. (*In re C.Y.* (2012) 208 Cal.App.4th 34, 40-42 [agency not required to investigate mother's adoption records and determine to what Indian tribe she was affiliated; if additional information about mother's tribal affiliation was contained and still available in adoption records, it was mother's responsibility to make an application to the appropriate county requesting such information and then provide it to the social worker].)

Recently, the California Supreme Court in *In re Abbigail A.* (2016) 1 Cal.5th 83, 88, invalidated rule 5.482(c), which provided that "[i]f after notice has been provided as required by federal and state law a tribe responds indicating that the child is eligible for membership if certain steps are followed, the court must proceed as if the child is an Indian child and direct the appropriate individual or agency to provide active efforts under rule 5.484(c) to secure tribal membership for the child." The court found the rule conflicted with the statutory definition of "Indian child" under California law (*In re Abbigail A., supra*, at p. 88), which had adopted the ICWA definition meaning "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); see also § 224.1, subd. (a) ["Indian child" "shall be defined as provided in [ICWA]"].)

Importantly for the present case, the court observed that nothing in the statutory "language or history demonstrate[d] that the Legislature intended to apply ICWA's requirements to, *or require membership applications be made on behalf of, children who are not Indian children as defined in ICWA*."[13] (*In re Abbigail A., supra*, 1 Cal.5th at

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[13] By contrast, the court found valid rule 5.484(c)(2), which provides in part: "In addition to any other required findings to place an Indian child with someone other than a parent or Indian custodian, or to terminate parental rights, the court must find that active efforts have been made . . . . [¶] . . . [¶] Efforts to provide services must include pursuit of any steps necessary to secure tribal membership for a child if the child is eligible for

p. 93, italics added.) Here, no evidence in the record shows E.J. was a member of the Cherokee Nation, and even assuming she was eligible for membership she was not *also* the biological child of a member of the tribe since father was not a member. Thus, E.J. was not an Indian child within the meaning of ICWA (see 25 U.S.C. § 1903(4); see also former § 224.1, subd. (a)), and the Department was not required to secure tribal membership on her behalf. (*In re Abbigail A., supra*, at p. 93.)

The Cherokee Nation determined E.J. was not an Indian child with respect to the tribe in several of its response letters. That determination is conclusive. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 55-56 [56 L.Ed.2d 106, 113-114] [the Indian tribe has exclusive authority to determine whether a child is or is not a member of or eligible for membership in the tribe]; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 470 [Indian tribe determines whether the child is an Indian child].) Given that none of the other tribes notified determined that E.J. was an Indian child, the trial court's determination that ICWA did not apply was supported by substantial evidence.

C. Adoptability

Father contends insufficient evidence supports the juvenile court's finding that E.J. would be adoptable within a reasonable time given her special needs based on known medical conditions and those which might be diagnosed in the future. We conclude substantial evidence supports the court's adoptability finding.

To terminate parental rights, "the [juvenile] court must find by clear and convincing evidence that it is likely that the child will be adopted." (*In re Asia L.* (2003)

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membership in a given tribe . . . ." (See *In re Abbigail A., supra,* 1 Cal.5th at p. 96.) Unlike rule 5.482(c), which the court invalidated, rule 5.484(c)(2) "speaks only to the court's obligations in a case involving an 'Indian child' as defined by law." (*In re Abbigail A., supra*, at p. 96.) Read in that manner, the court found that a juvenile court could properly "direct that steps be taken to pursue tribal membership for a child who, while not a member of a tribe, is already an Indian child to whom ICWA applies because he or she is both eligible for membership and also the biological child of a member." (*Id.* at pp. 96-97; see also 25 U.S.C. § 1903(4); former § 224.1, subd. (a).)

107 Cal.App.4th 498, 509; see also § 366.26, subd. (c)(1).) There must be "convincing evidence of the likelihood that adoption will take place within a reasonable time." (*In re Brian P., supra,* 99 Cal.App.4th at p. 624.)

On appeal, we must uphold the finding of adoptability and termination of parental rights if they are supported by substantial evidence. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) We "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) "In selecting a permanent plan for an adoptable child, there is a strong preference for adoption over nonpermanent forms of placement." (*In re Zachery G.* (1999) 77 Cal.App.4th 799, 809.)

The issue of adoptability "focuses on the *minor*, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.] Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) But, " 'the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family*.' " (*In re Lukas B., supra,* 79 Cal.App.4th at p. 1154.)

Father contends the court failed to carefully assess E.J.'s special needs, and that its finding that she was adoptable was, at a minimum, premature. He argues the adoption assessment failed to include information regarding the underlying causes of E.J.'s delays and headaches for which the court had authorized an MRI scan, and did not include an

updated evaluation from her occupational therapist who was working with E.J. to address her flat effect and appropriate emotional responses.

While father complains about the purported lack of information in the adoption assessment on appeal, he never objected to the report below. Having failed to object to the adoption assessment's adequacy in the juvenile court, father has waived any such objections on appeal. (*In re A.A., supra*, 167 Cal.App.4th at p. 1317; *In re Brian P., supra*, 99 Cal.App.4th at p. 623.)

To the extent father relies on *In re Valerie W.* (2008) 162 Cal.App.4th 1, where the appellate court found that insufficient evidence supported an adoptability finding because the adoption assessment was statutorily inadequate, he overlooks the fact that the parties in *Valerie W.* did challenge the assessment's adequacy in the trial court. (*Id.* at p. 7.) *Valerie W.* thus does not persuade us to consider father's criticisms for the first time on appeal. (*In re A.A., supra*, 167 Cal.App.4th at p. 1317.)

In this case, evidence showed the foster parents, whom E.J. had been with since she was two months old, wanted to adopt her. This is *evidence* that E.J. was adoptable within a reasonable period of time. (*In re Lukas B., supra*, 79 Cal.App.4th at p. 1154.) The record also shows that shortly before the section 366.26 hearing the court approved an MRI for E.J. to determine the cause of her headaches and delays, and that E.J. and her foster parent had already attended early interventions and therapy to address E.J.'s reactive attachment disorder. Given that E.J. had been with the foster family since infancy, the prospective adoptive parents were well aware of her potential health issues. Knowing this information, the foster family still wanted to adopt E.J. And, according to the adoptions assessment, they also knew how to access counseling services on her behalf should the need arise in the future. The record shows the court was also aware of those issues, which were presented to the court in various reports and at other hearings that occurred just before the section 366.26 hearing, even if the MRI or reactive attachment disorder diagnosis were not discussed in the adoption assessment.

The willingness of the foster family to adopt E.J. after having cared for her for nearly two years, notwithstanding the health issues that had been identified, demonstrates that none of the child's characteristics cause her to be considered unadoptable. Substantial evidence therefore supports the juvenile court's finding that E.J. was likely to be adopted within a reasonable time.

D. Indian Child Exception to Adoption

Father contends the juvenile court erred in not applying the Indian child exception to adoption under section 366.26, subdivision (c)(1)(B)(vi). Because E.J. is not an Indian child within the meaning of ICWA, the exception did not apply. The court, then, did not err in failing to apply the exception.

If a child is adoptable, the juvenile court must terminate parental rights unless it finds one of several specified circumstances in which termination would be detrimental. (§ 366.26, subd. (c).) One such exception is if "[t]he child is an Indian child and there is a compelling reason for determining that termination of parental rights would not be in the best interest of the child, including, but not limited to: [¶] (I) Termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights. [¶] (II) The child's tribe has identified guardianship, foster care with a fit and willing relative, tribal customary adoption, or another planned permanent living arrangement for the child. [¶] (III) The child is a nonminor dependent, and the nonminor and the nonminor's tribe have identified tribal customary adoption for the nonminor." (§ 366.26, subd. (c)(1)(B)(vi)(I)-(III).) The Indian child exception thus creates a "best-interest" exception to parental rights termination for an Indian child. (*In re A.A., supra,* 167 Cal.App.4th at pp. 1321-1322.)

By the statute's plain language, the exception applies only to an Indian child, which has a specific statutory meaning under ICWA. (25 U.S.C. § 1903(4); see *In re A.A., supra*, 167 Cal.App.4th at p. 1322 [noting that the Indian child exception authorizes a court to consider whether there is a compelling reason for determining that termination

of parental rights would not be in an *Indian child's* best interest; "the Indian [c]hild [e]xception confers broader discretion to the court, in the case of an *Indian child*, than it would otherwise possess at a permanency planning hearing to consider whether termination would be detrimental to an adoptable child" (italics added)].) As discussed above, the trial court properly found E.J. was not an Indian child within the meaning of ICWA. The Indian child exception therefore did not apply to her, and the court did not err in failing to apply the exception to the permanent plan of adoption.

III. DISPOSITION

The juvenile court's orders terminating reunification services and father's parental rights are affirmed.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

ROBIE, J.